

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
58-01 JUNCTION GROCERY CORP.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1979	:	
through November 30, 1983.	:	

Petitioner, 58-01 Junction Grocery Corp., 58-01 Junction Boulevard, Rego Park, New York 11373, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through November 30, 1983 (File No. 800953).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 10, 1988 at 10:15 A.M. with all briefs to be submitted by July 14, 1988. Petitioner appeared by Sanford B. Goldberg, Esq. The Audit Division appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

- I. Whether a certain bulk sale took place on October 10, 1983 or sometime after said date.
- II. Whether the notices of determination and demands for payment of sales and use taxes due issued to petitioner were timely.
- III. Whether petitioner is liable for penalty and interest.
- IV. Whether the assessment against petitioner should be reduced by any reduction required as a result of an Article 78 proceeding commenced by the bulk seller.

FINDINGS OF FACT

1. On January 13, 1984, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due to petitioner, 58-01 Junction Grocery Corp., covering the period December 1, 1979 through November 30, 1983 for taxes determined to be due from Beit Najjar, Inc. ("seller") and which represented petitioner's liability as a purchaser in a bulk sale from the seller. The notices assessed tax, penalty and interest as follows:

(a) For the period December 1, 1979 through May 31, 1983, \$305,086.65 in tax, \$67,575.61 in penalty and \$88,349.98 in interest, for a total due of \$461,007.24.

(b) For the period June 1, 1983 through November 30, 1983, \$34,050.49 in tax,

\$2,409.04 in penalty and \$1,025.01 in interest, for a total due of \$37,484.54.

2. On November 2, 1984, the Audit Division issued to petitioner two notices of assessment review reducing petitioner's liability based on an adjustment of the liability of the seller:

(a) For the period December 1, 1979 through May 31, 1983, adjusted tax due \$219,680.37, adjusted penalty and/or interest \$153,939.52, total due \$373,619.89.

(b) For the period June 1, 1983 through November 30, 1983, adjusted tax due \$16,966.43, adjusted penalty and/or interest \$5,001.59, total due \$21,968.02.

The Audit of Beit Najjar, Inc.

3. An examination of the seller's books and records by the Audit Division was scheduled to commence on February 3, 1983. The audit, however, was postponed for approximately six months at the request of the seller's accountant. The auditor did, however, visit the store on February 24, 1983 and obtained sample selling prices of taxable items. The examination of the books and records eventually was commenced on August 8, 1983. The auditor found the books and records to be inadequate and incomplete. Accordingly, sales were reconstructed using a markup method based on the test months of August 1982 and February 1983. The seller executed consents extending the period of limitation on assessment for the period December 1, 1979 through November 30, 1980 to March 20, 1984. The audit ultimately resulted in assessments issued to the seller on January 13, 1984 in the same amount as those issued to petitioner. Said assessments were also reduced by notices of assessment review similar to those issued to petitioner on November 2, 1984.

The Bulk Sale

4. On October 17, 1983, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk pertaining to the sale of the assets of a supermarket located at 58-01 Junction Boulevard, Rego Park, New York. The purchaser was said to be 58-01 Junction Grocery Corp. and the seller was named as Beit Najjar, Inc. The selling price of the assets sold was stated to be as follows:

Furniture, fixtures, etc.	\$ 10,000.00
Motor vehicles	-0-
Inventory	180,000.00
Real estate (leasehold)	-0-
Good will and other assets	<u>210,000.00</u>
Total selling price	\$400,000.00

The document was signed by Edilio Flores, president of petitioner, and was dated October 10, 1983. It was mailed by certified mail, return receipt requested, and the envelope in which it was enclosed was postmarked October 13, 1983.

5. On October 24, 1983, the Audit Division sent a Notice of Claim to Purchaser to petitioner in care of its attorneys, the address listed in the notification of sale described in Finding of Fact "4". This document was issued to place petitioner on notice of a potential New York

State claim for sales and use taxes owed by the seller.

6. Also on October 24, 1983, the Audit Division issued a Notice to Escrow Agent advising the escrow agent (seller's attorneys) of a possible claim for New York State sales and use taxes.

7. On November 22, 1983, the Audit Division issued a Notice to the Seller to Beit Najjar, Inc. advising it of a possible claim for sales and use taxes and advising it also that it would be contacted by an Audit Division district office with respect to an examination of its books and records.

8. When petitioner learned of the potential tax liability, it stopped payment on the notes issued to the seller.

9. The assessments against the seller, as modified by the notices of assessment review, were sustained by the State Tax Commission in a decision dated February 24, 1987 and the seller commenced an Article 78 proceeding for review of said decision. The Article 78 proceeding is currently pending in the Appellate Division, Third Department.

PETITIONER'S POSITION

10. Petitioner contended at the hearing that the original closing date for the bulk sale had been cancelled and that the transaction closed at a later date. Petitioner's representative requested time after the hearing in which to submit documentary evidence showing that the closing did not take place on October 10, 1983, but sometime thereafter. Petitioner was granted one month for said purpose but nothing was submitted.

11. Petitioner's representative asserted that approximately \$230,000.00 to \$250,000.00 is being held in escrow pending a determination of the United States District Court as to the rights of the Internal Revenue Service, the State of New York and other claimants to said funds.

CONCLUSIONS OF LAW

A. That Tax Law § 1141(c) makes it incumbent on the purchaser in bulk of business assets to file a notice of the proposed transaction with the State Tax Commission¹ at least ten days prior to taking possession of the assets or paying for them. By failing to give such notice, the purchaser may be personally liable for the seller's unpaid sales or use taxes to the extent of the price paid for the assets or their fair market value, whichever is higher. The Audit Division must notify the purchaser and seller of the actual amount of taxes due from the seller within 90 days of the receipt of the notice of bulk sale. (See also 20 NYCRR part 537.)

¹During the period at issue, notice was to be given to the State Tax Commission. Effective September 1, 1987, the term "State Tax Commission" as used in Tax Law § 1141(c) is to be deemed to refer to the Division of Taxation or the Commissioner of Taxation and Finance (see ___ Tax Law § 2026).

B. That petitioner has not sustained its burden of proof to show that the notice required by Tax Law § 1141(c) was timely given. The evidence indicates that the transaction in question closed on October 10, 1983 and that the notice of sale was mailed three days later on October 13, 1983 and received by the Audit Division on October 17, 1983. Petitioner has offered no evidence to show that the closing was adjourned to a date later than October 10, 1983, as contended by petitioner. Accordingly, since the notice of sale was received by the Audit Division on October 17, 1983, the notices of determination and demands for payment of sales and use taxes due issued to petitioner on January 13, 1984 were timely, and petitioner is liable for the unpaid sales and use taxes of the seller to the extent of the price paid or the fair market value, whichever is greater.²

C. That 20 NYCRR 537.4(e) provides as follows:

"The liability of the purchaser, transferee or assignee is assessed and enforced in the same manner as the liability for any tax imposed by article 28 of the Tax Law, and includes penalty and interest imposed on the sales tax for which the seller is liable."

D. That 20 NYCRR 537.4(f) provides as follows:

"If the purchaser, transferee or assignee establishes that his failure to comply with the provisions of section 537.3 of this Part was not willful or with intent to evade or defeat the tax, the Tax Commission may waive penalties and as much of the interest as it is authorized to waive pursuant to law. Any such waiver with respect to the purchaser, transferee or assignee, however, does not act as a waiver on behalf of the seller, transferrer or assignor."

E. That 20 NYCRR 537.3, referred to in 20 NYCRR 537.4(f), sets forth the rights and obligations of purchasers, transferees and assignees. It provides, in pertinent part:

"(a)(1) A purchaser, transferee or assignee of business assets in a bulk sale must give timely notice to the Tax Commission concerning the bulk sale as provided for in paragraph (c) of section 1141 of the Tax Law, and Section 537.2 of this Part."

F. That the regulations clearly distinguish between bulk sellers and bulk purchasers with respect to waiver of penalties and statutory interest. The bulk seller must show that failure to pay over tax was due to reasonable cause (20 NYCRR 536.5[a]), while the bulk purchaser need only show that his failure to comply with the bulk sale requirements (20 NYCRR 537.3 [Conclusion of Law "E"]) was "not willful or with intent to evade or defeat the tax" (20 NYCRR 537.4[f] [Conclusion of Law "D"]). It is noted that the language of section 537.4[f] is similar to language used in Tax Law § 685(g), which provides income tax withholding penalties for "[a]ny person...who...willfully attempts...to evade or defeat the tax or the payment thereof" (Tax Law § 685[g]). In interpreting the term "willfully", as used in Tax Law § 685(g), the New York Court of Appeals has held that the test is "whether the act, default, or conduct is consciously and

²Petitioner has not alleged that the selling price indicated in the bulk sale notice was incorrect and the Audit Division has not claimed that the fair market value was higher than the selling price.

voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes" (Levin v. Gallman, 42 NY2d 32, 34). By analogy, it is clear that petitioner need not show that the nonpayment of the liability was due to reasonable cause, but need only show that, in failing to timely file the notice of sale, it did not act consciously and voluntarily with the knowledge that taxes owing would not be paid (but see, Matter of Giovanni Velez, Tax Appeals Tribunal, May 26, 1988).

G. That petitioner's failure to file the notice of sale was not willful or with the intent to evade or defeat the tax. In fact, it appears that petitioner and its principals were the unwitting victims of the seller's principals, who offered the business for sale when faced with an audit, and that they were also the victims of their own former representatives, who failed to timely file the notice required by Tax Law § 1141(c). Accordingly, the penalty and interest above the minimum rate are to be cancelled insofar as they apply to petitioner.

H. That while it would seem that any reduction of the seller's liability made by virtue of the Article 78 proceeding (Finding of Fact "9") should also reduce the assessment made against petitioner, the relief requested by petitioner with respect to said proceeding is, at this point, beyond the jurisdiction of the Division of Tax Appeals.

I. That the petition of 58-01 Junction Grocery Corp. is granted to the extent indicated in Conclusion of Law "G" and except as so granted the petition is denied, and the notices of determination and demands for payment of sales and use taxes due issued January 13, 1984, as modified by the notices of assessment review issued November 2, 1984, are otherwise sustained.

DATED: Albany, New York
November 23, 1988

/s/ Robert F. Mulligan
ADMINISTRATIVE LAW JUDGE